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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 444th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 12 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 2.20 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 2 (continued)

1. The CHAIRMAN invited the United Kingdom representative to report on the deliberations of the drafting group consisting of the delegations of Finland, Japan and the United Kingdom on a text for inclusion in the definition of the term "execution" in article 2(1), in respect of action by the beneficiary's bank.

2. Mr. GREGORY (United Kingdom) said that the group had extended the existing definition to cover action by the beneficiary's bank by adding a mention of the situations contemplated in article 8(1)(d) to (g) of the draft. The proposed wording took the form of the following additional sentence at the end of article 2(1):

> "With respect to the beneficiary's bank, "execution" means the doing of any of the following acts:
>
> (i) Crediting the beneficiary's account or otherwise placing the funds transferred at its disposal;
>
> (ii) Giving notice to the beneficiary that it has the right to withdraw the funds or use the credit;
>
> (iii) Applying the credit as instructed in the payment order received by the beneficiary's bank; or
>
> (iv) Applying the credit to a debt of the beneficiary owed to the beneficiary's bank or in conformity with an order of a court."

The text was lengthy, but the information which it conveyed would be located more appropriately in article 2 than in article 8, which could be shortened accordingly.

3. Mr. ABASCAL ZAMORA (Mexico) said that he saw no advantage in the definition proposed by the three-delegation group since it added nothing to what the draft already provided for determining the time when the beneficiary's bank should act. Under Mexican law, the most important role of the beneficiary's bank lay in acceptance of the payment order, and that was dealt with clearly in article 8. The notion of execution by the beneficiary's bank implied an obligation on the part of the beneficiary's bank, and to introduce it was to bring in something which, in the light of article 17(1), lay outside the scope of the Model Law. The definition raised difficulties and he could not accept it. Action by the beneficiary's bank would be examined under articles 9 and 10.

4. Mr. DE BOER (Netherlands) observed that the introductory wording of article 8(1) contained the words "at the earliest of the following times". He therefore thought it would be logical for the proposed additional sentence to refer to "the earliest of the the following acts".

5. Mr. BHALA (United States of America) felt that a definition of execution by the beneficiary's bank was needed since the definition to be adopted for the term "bank", or some equivalent, hinged on the question of execution. As a simpler alternative to the three-delegation proposal, he suggested the words "a beneficiary's bank executes an order by accepting the order". Acceptance was dealt with in article 8. His proposal would cover article 8(1) as a whole, whereas the three-delegation proposal covered only subparagraphs (d) to (g) of article 8(1).

6. Mr. RENGER (Germany) pointed to the contrast between the definition of the term "execution" proposed by the Working Group and the definition introduced by the United Kingdom representative, which included action by the beneficiary's bank. In his view, although the receiving bank was in a direct line of contractual action, it was debatable whether the beneficiary's bank was so obliged. There was a legal difference between executing a payment order and accepting one.

7. The CHAIRMAN pointed out that the beneficiary's bank was also a receiving bank.

8. Ms. KOSKELO (Observer for Finland) said that the three-delegation drafting group had been careful not to confuse the notions of acceptance and execution; the United States proposal, on the other hand, suggested that the two were the same thing. The aim of the drafting group had been to define execution by the beneficiary's bank in terms of certain acts which were tantamount to acceptance. Subparagraphs (a) to (c) of article 8(1) mentioned other acts which were to be construed as acceptance. As far as the beneficiary's bank was concerned, the group had referred solely to acts whereby the funds were made available to the beneficiary or the credit was applied. She strongly opposed the wording proposed by the United States because it would mean that acceptance could take place only through execution.

9. Mr. POTYKA (Observer for Austria) said that his delegation opposed the idea that acceptance by the beneficiary's bank should mean execution. It supported the view expressed by Germany. Austria saw an inconsistency between subparagraphs (d) to (g) of article 8(1) and article 9(1). It was illustrated best by the example that if the beneficiary's bank applied his credit in conformity with an order of a court, as contemplated in article 8(1)(g), it would be obliged, in accordance with article 9(1), to place the funds at the disposal of the beneficiary. That would obviously be forbidden by the court order.

10. Mr. BHALA (United States of America) said that it had not been his delegation's intention to confuse acceptance and execution. The definition proposed by the three-delegation group provided that the beneficiary's bank would execute the payment order when it accepted it in one of the ways set out in subparagraphs (d) to (g) of article 8(1). His delegation was suggesting

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that the definition should cover in addition the conditions set out in subparagraphs (a) to (c) of article 8(1). It would be best for the reader to be confronted with a brief definition in article 2 and a more comprehensive list of situations in article 8(1).

11. The CHAIRMAN asked the United States delegation to express his views about subparagraphs (a) and (b) of article 8(1) in relation to the projected use of the word "execute", and also to explain how he saw article 9(1) in the context of execution. His own understanding of the discussion at the previous meeting was that, whatever the drafting group might suggest, execution would continue to mean conduct which brought into play the provision in article 9(1).

12. Mr. DUCHEK (Observer for Austria) said that he was disheartened to find that the Commission appeared to be adding complication to complication as the work went on, to the extent that the text of the draft was becoming unintelligible to those who had not worked on it from the start. He questioned the need for a definition of the term "execution"; the body of the text might be made sufficiently clear for one to be dispensed with altogether.

13. Ms. KOSKELO (Observer for Finland) agreed with the previous speaker that the text was becoming increasingly complicated; however, the value of a good definition was that once the term had been defined it could be used throughout a document without further explanation. She agreed too with the observer for Austria who had spoken earlier in the meeting that there was a discrepancy between articles 8(1) and 9(1). The latter provision would need to be amended.

14. The effect of the proposal by the representative of the United States would be that execution by a beneficiary's bank would be defined as acceptance. However, subparagraphs (a) to (c) of article 8(1) described events that might constitute acceptance but could not suffice to constitute execution of a payment order. The first of them was the so-called "deemed acceptance", contemplated in subparagraph (a); the position there was basically that acceptance took place after a certain lapse of time and when the funds had arrived at the beneficiary's bank - it was merely a matter of time and required no action on the part of the bank in order to occur. Next was the situation in which acceptance took place when the bank received the payment order, as provided in subparagraph (b); receipt alone could be construed as acceptance, but not as execution. Finally, article 8(1)(c) set out the rule that acceptance took place when the receiving bank notified the sender of acceptance, meaning that it occurred when the beneficiary's bank took action towards the sender of the payment order; execution, however, must surely relate to the beneficiary and not to the sender. Her delegation took the view that execution could be deemed to have taken place only when funds were placed at the disposal of the beneficiary or when the credit received was otherwise applied for his benefit.

15. Mr. AL-NASSER (Observer for Saudi Arabia) said that in attempting to define execution the Commission appeared to be seeking a solution to that problem by linking it to another one, namely time of execution. A simple proposal which avoided that pitfall was that execution should be defined as the commitment by the beneficiary's bank to accept the payment order.

(Mr. Al-Nasser, Observer for Saudi Arabia)

16. The observer for Finland had indicated that actual execution took place when funds were credited to the beneficiary's account at his bank, but in his view agreement by the beneficiary's bank to implement a payment order meant crediting the money to the account of the beneficiary.

17. The CHAIRMAN said that he concluded from the discussion that neither the wording suggested by the drafting group nor that proposed by the United States would command acceptance. The observer for Finland had suggested that article 9(1) should be amended, but his own feeling was that the Commission might go beyond the intent of the Model Law if it deviated too far from the existing text of that provision.

18. Mr. ADEDIRAN (Nigeria) suggested that an analysis be made of what was said in article 9 in respect of domestic law, and the results used as a guide.

19. Mr. HUANG Yangxin (China) proposed the addition to article 2(1) of a sentence reading: "With respect to the beneficiary's bank, 'execution' means actions taken by the beneficiary's bank in order to place funds at the disposal of the beneficiary after acceptance of the payment order."

20. The CHAIRMAN asked the representative of China whether he felt that the phrase "after acceptance of the payment order" was strictly necessary. If not, his proposal would come very close to that of the drafting group.

21. Mr. ABASCAL ZAMORA (Mexico) said that his delegation's thinking had much in common with that of the delegation of Austria. Execution needed defining in respect of articles 8(1) and 10. It was not until those articles had been looked at that it was possible to know whether a definition of the term "execution" was needed. He would like to see the drafting group's proposal held over until that time.

22. Mr. BURMAN (United States of America) supported the Mexican suggestion. His delegation would reply later to the questions put to it by the Chairman and hoped that its answers might help the Commission to deal with some of the points raised by the observer for Finland and other speakers.

23. Mr. GREGORY (United Kingdom) also supported the suggestion made by the representative of Mexico. If the matter was put to one side it might well be found later that no definition of the term "execution" was needed. The Working Group had managed without one until its twenty-second session the previous December. He agreed with the observer for Austria about the danger of drafting a text which could be understood only by its authors. There was a good case for the Model Law to use the word "execute" in its ordinary meaning and leave its interpretation to individual legislators. Further consideration of the substantive matters dealt with in articles 8, 9 and 10 would be required. He pointed out that the three-delegation drafting group had been very mindful of the importance of keeping the notions of execution and acceptance separate. In certain factual situations, however, the two operations took place simultaneously. There was certainly some potential for confusion if acceptance had not taken place by the time that execution occurred, because acceptance would then mean that the bank must execute.

24. The CHAIRMAN said he felt that the Commission had reached a tentative conclusion. It had possibly been optimistic in seeking to extend the definition of the term "execution" to include action by the beneficiary's bank. There were good reasons for the wording of the definition as it stood. Since the Model Law utilized notions of acceptance and execution in relation to the same conduct simultaneously, it became difficult to maintain the distinction between them, but the basic framework of the Model Law would collapse if they were merged. When the Commission came to consider article 6(2)(d), concerning the issuing of a payment order intended to carry out the payment order received, it could consider further whether the definition of the term "execution" in article 2(1) was really necessary.

25. To sum up, as far as the attempt to define "execution" with respect to the beneficiary's bank was concerned, it had become evident from the discussions that it was difficult to draft an appropriate definition without risking the confusion he had mentioned between the notions of "execution" and "acceptance", and without going beyond the limit that had been established for the matters to be governed by the Model Law under the line of demarcation represented by article 9(1). He therefore suggested that the Commission should decide to do without a definition of "execution" with respect to the beneficiary's bank. He further suggested that the definition of "execution" in article 2(1) (in relation to a receiving bank other than the beneficiary's bank) should be retained for the time being, with the understanding that some drafting change would be needed to make it clear that there was no intention to confine the term "execution" to receiving banks other than the beneficiary's bank.

26. It was so agreed.

27. The CHAIRMAN invited the Commission to take up subparagraph (m) of article 2. In relation to that subparagraph, there was a written proposal from the United Kingdom to delete the definition (A/CN.9/347, pp. 54-55). The United Kingdom proposed that where the term "payment date" was used in the draft it should be replaced by the term "execution date", except in article 10(1), and that in article 10(1) its meaning should be spelt out, making a definition of "payment date" unnecessary.

28. The Commission might also wish to consider the question of terminology discussed in paragraph 67 on page 23 of the Secretariat's comments (A/CN.9/346).

29. Mr. DE BOER (Netherlands) supported the proposal to delete subparagraph (m) and do without a definition of "payment date" in article 2.

30. The CHAIRMAN noted that it might not be necessary to use the term "payment date" even in article 10(1). If the United Kingdom proposal in document A/CN.9/347 was adopted, article 10(1)(b) would begin: "the order specifies a date when the funds are to be placed at the disposal of the beneficiary".

31. Mr. LIM (Singapore) supported the United Kingdom proposal.

32. The CHAIRMAN said he took it that there was agreement that subparagraph (m) of article 2 should be deleted, on the understanding that its substance would be incorporated in article 10(1)(b) when that provision was taken up.

33. It was so decided.

34. The CHAIRMAN invited the Commission to consider proposals for adding further definitions to article 2. Three additional definitions had been proposed by the United States of America (A/CN.9/347/Add.1, pp. 12-13).

35. Mr. BHALA (United States of America) said that the United States had proposed the addition of definitions of the terms "credit transfer system", "interest" and "revocation". If the Commission decided to replace the term "bank" in article 2(f) by a term such as "credit transfer entity", it might be necessary to use some term such as "payment management system" instead of "credit transfer system". The additional definitions were proposed in the interests of clarity, certainty and predictability.

36. The proposed definition of "interest" was based on the Guidelines on International Interbank Funds Transfer and Compensation of the International Chamber of Commerce (ICC). Interest was a frequently litigated issue and the Commission should not leave its meaning in doubt.

37. Mr. AZZIMAN (Morocco) said that his Government had pointed out in its written comments (A/CN.9/347/Add.1, p. 7, sect. 2) that the term "purported sender" was not defined in the Model Law. If other delegations also felt that the term required explanation, a definition of "purported sender" could perhaps be included in article 2(e) in combination with the definition of "sender".

38. The CHAIRMAN suggested that the point should be taken up under article 4. There were some proposals for amendments to that article; the Commission could keep in mind the point raised by the Moroccan delegation and come back later if necessary to the question of a possible definition.

39. Mr. ABASCAL ZAMORA (Mexico) pointed out that his Government's written comments in document A/CN.9/347 (p. 43) contained a proposal which included a definition of the term "interest". The proposed definition reproduced practically verbatim the definition in the ICC Guidelines. In the Working Group, his delegation had been hesitant to accept such a definition of interest, but now that the authorities in Mexico had had an opportunity to study the Guidelines his Government was in favour of including a definition of interest based on them. His delegation therefore agreed with the idea behind the United States proposal, though there were some textual differences between the definition proposed by Mexico and that proposed by the United States.

40. Mr. CONOBOY (United Kingdom) said that there should be a definition of interest; the problem lay in reconciling the proposals made by the delegations of the United States and Mexico. The United States proposal defined interest as the interbank rate of interest in the currency of the State in which the receiving bank was located, whereas the Mexican proposal defined it as the

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time value of the transaction amount in the country of the currency involved. If that time value referred to the currency of the payment order, it might not be the same as the interbank rate of interest in the currency of the State in which the receiving bank was located. As he understood it, the ICC Guidelines corresponded to the Mexican proposal, so that the determining factor would be the currency.

41. Mr. ABASCAL ZAMORA (Mexico) said that his delegation's proposal drew on the ICC definition, while the preference of the United States delegation was to refer to the interbank interest rate. The difference lay in the degree of flexibility afforded by the ICC approach, which clarified the definition of interest by introducing the notion of time value.

42. The CHAIRMAN said that it was not clear from the Mexican proposal whether the currency used as the unit of account or the currency used for payment should be taken as the basis for calculating interest.

43. Mr. ABASCAL ZAMORA (Mexico) said that he would welcome some time in which to consider that point.

44. Mr. BHALA (United States of America) said that the ICC definition was the following: "Interest is the time value of the transaction amount in the country of the currency involved. Interest compensation shall be calculated at the rate and on the basis customarily accepted by the local banking community of such country". The text thus differed from the Mexican proposal only in referring to "interest compensation".

45. Mr. VASSEUR (Banking Federation of the European Community) said that the second sentence of the French text of the ICC definition referred to "dommages-intérêts".

46. Mr. LE GUEN (France) said that rates of interest varied with currency fluctuations, but that was obviously a factor which was of concern to the beneficiary rather than the sender. The United States definition and the definition derived from that of ICC both linked interest to the currency of a given country, but he wondered how that formula could take into account the ECU, which was not tied to any particular country. He pointed out that the ICC recommendations related exclusively to interbank transfers of funds, whereas the Model Law also made provision for payment of interest to originators or beneficiaries which were not necessarily banks.

47. Mr. BHALA (United States of America) said that the Commission's prime concern should be to arrive at a predictable and uniform Model Law. It might help in drafting a definition if it was borne in mind that the currency of the credit transfer might not be the same as that of the country in which the receiving bank was located. In practice, however, that might not prove to be a significant consideration. If interest compensation was paid, the parties to the credit transfer, either the originator or the beneficiary, might prefer compensation in a particular currency, so that the ICC definition might prove to be more workable.

(Mr. Bhala, United States of America)

48. With regard to the ECU, he said that the text of the definition could accommodate the concern voiced by the representative of France by referring to "units of account".

49. Mr. ABASCAL ZAMORA (Mexico) said that it was his impression from the discussions in the Working Group that the only interest rate which would be generally acceptable was the interbank interest rate. With regard to the term "units of account", he suggested that his delegation and that of the United States might jointly work out an agreed formulation to be submitted to the Commission.

50. Mr. KOMAROV (Union of Soviet Socialist Republics) said that his delegation favoured the wording derived from the ICC definition, as reflected in the proposal of Mexico.

51. Mr. HERZBERG (Observer for Israel) agreed with the previous speaker.

52. Mr. SCHNEIDER (Germany) said that the Mexican proposal was one of the options available to the Commission. Another was to refrain from defining "interest" altogether, while a third was to leave it to the countries adopting the Model Law to establish a precise percentage for interest payable as compensation.

53. Mr. CONOBOY (United Kingdom) said that his delegation would prefer a definition modelled on the ICC definition and therefore based on the interbank interest rate applicable to the currency of the transfer.

54. Mr. BURMAN (United States of America) said that his delegation's proposal was intended to prevent litigation by harmonizing national legislation in the field of interest rates. It believed that a definition would be essential for that purpose.

55. Mr. BERGSTEN (Secretary of the Commission) said that the issue raised by the definition of "interest" should be considered in the light of article 16, which related to liability and damages.

The meeting rose at 5.10 p.m.